STATEMENT OF THE

The National Law Center for Children and Families

To accompany the testimony of
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Hearing before the Committee on Commerce
United States Senate
March 4, 1999

NLC Comments on S. 97: The Children's Internet Protection Act

I. Overview:

S. 97 is exclusively a spending bill. It amends 254(h) of the Communications Act of 1934, 47 U.S.C. 254(h). The amendments place limitations on the expenditure of federal monies, so as to prevent federal funds from being used to support in any way the provision of unrestricted Internet access to minors to materials that could be deemed to be harmful to minors. What constitutes material harmful to minors is determined by state officials vested with the administrative decision making authority over the elementary and secondary schools or libraries which take advantage of the incentives granted by the Act. This approach appears to draw support from a line of case law which discusses (1) federal spending, such as *Rust v. Sullivan*, 500 U.S. 173 (1991), and *National Endowment for the Arts v. Finley*, ___ U.S. ___, No. 97-371 (June 25, 1998); and (2) the right of the States to protect minors, and to enact regulations which accord minors a more restricted right than that assured to adults to judge and determine for themselves what material they may read and see (*see Ginsberg v. New York*, 390 U.S. 629, at 637-43 (1968); and *Board of Education v. Pico*, 457 U.S. 853 (1982).

Numerous elementary and secondary schools and libraries across the Nation provide access to minors to the Internet or to an online computer service. S. 97 intends to recognize and address:

1. the goal of providing free access by minors to educationally suitable information sources on the Internet, and

2. the compelling need to balance this goal with the federal Government's obligation not to interfere with the State's right and duty to protect minors from contact with sexual predators and access to material that is obscene, child pornography, Harmful to

Minors, or otherwise inappropriate for minors.

Minors, who use a school or library Internet or online computer services, have access to material that is obscene, harmful to minors, pervasively vulgar, conducive to a hostile school environment, or is otherwise educationally unsuitable. The dilemma is that, without the use of technology that blocks or filters material, providing free access to the Internet by minors is certain to provide minors with access to material which is harmful and inappropriate for them.

The problem of adults using library computers to access pornography that is then exposed to staff, passersby, and children, and the problem of minors accessing child and adult pornography in libraries has been recently documented and reported in a study entitled *Dangerous Access: The Epidemic of Pornography in America's Public Libraries and the Threat to Children. A Report by Filtering Facts,* which can be accessed at http://www.filteringfacts.org.

That Website also republished two legal reports by the National Law Center for Children and Families on issues germane to this Bill:

1. NLC Memorandum of Law on Legal Issues Involving the Use of Filtering Software by Libraries, Schools, and Businesses (1997) and

2. NLC Memorandum of Law on Immunity for Filter Use; Legal Issues Involving 47 U.S.C. § 230(c)(2) ("Protection for 'Good Samaritan' Blocking and Screening of Offensive Material") and its Impact on Existing Law: Federal Law Authorizes and Protects the Good Faith Use of Filtering Software on all Interactive Computer Services to Restrict Access to or Availability of Objectionable Material and Specifically Preempts any Contrary Federal or State Law (1998).

II. General Principles:

The First Amendment does not protect the dissemination to minors of material which can be deemed:

1. obscene (hard-core pornography), under the Constitutional standard enunciated in *Miller v. California*, 413 U.S. 15, 24-25 (1973), *Smith v. United States*, 431 U.S. 291, 300-02, 309 (1977), *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987), and related cases;

2. child pornography (minors in sexually explicit conduct), under the Constitutional standard enunciated in *New York v. Ferber*, 458 U.S. 747 (1982);

3. harmful to minors (soft-core pornography), under the Constitutional standard enunciated in *Ginsberg, supra*; or

4. subject to regulation by State school or library administrators, where the intended recipient audience are minors, under the principles discussed in *Pico, supra.*

It is permissible for the federal government to enact legislation that declares that Federal funds may not be used to provide minors with the categories of material listed above. It is also permissible, in a spending bill with no criminal mandate on the public or on specific materials, for Congress to provide economic incentives for protecting minors even from materials that are not unlawful or unprotected as to minors. This broader protection could include, but extend beyond, the above categories. Such materials could be of a broader scope, such as a category of materials deemed inappropriate for minors , which could include pornography that is obscene, child pornography, or Harmful to Minors, but could also include, though not limited to, other hurtful, offensive, or inappropriate materials, even if constitutionally protected, such as hate speech, bomb or poison making, excessive violence, *etc*. Congress may mandate the exclusion of access to unprotected obscenity and child pornography, but may also empower the restriction from minors of materials that are Harmful to Minors and otherwise inappropriate for minors.

In order for elementary or secondary schools, and libraries, to be eligible to receive or retain federal universal service assistance to the e- rate for Internet access, S. 97 requires that said schools and libraries:

1. install and use a technology filtering or blocking material on the Internet deemed harmful to minors, on all computers providing Internet access to minors under the age of 17 years of age.

2. submit to the FCC certification of compliance with the requirements imposed by the Act, and ensure the use of said computers in accordance with their certification.

This Bill does not affect Internet access by adults, but is specifically limited to apply to school or library computers only during use of such computers by minors. S. 97 requires that:

1. Elementary and Secondary Schools certify that the school, school board, or other authority with responsibility for administration of the school has selected a technology for its computers with Internet access in order to filter or block Internet access through such computers to material deemed harmful to minors, and that it is enforcing a policy to ensure the operation of the technology during any use of such computers by minors.

2. Libraries with only one computer are not required to install and use a blocking or filtering technology on that one computer, as long as the library certifies that the library is enforcing a policy to ensure that minors do not use said computer for Internet access to material that is deemed to be harmful to minors.

3. Libraries with more than one computer having Internet access are required to certify that the library has selected a technology to filter or block Internet access through such computers to material deemed harmful to minors, and is enforcing a policy to ensure the operation of the technology during use of such computers by minors.

III. S. 97 should define the term "harmful to minors" as a legal term of art or be clarified to refer to what is "inappropriate for minors".

Under Constitutional law cases, Harmful to Minors is a legal term of art which describes a category of pornographic materials which, when disseminated to minors, falls outside the protection of the First Amendment and is subject to state regulation. *See Ginsberg v. New York*, 390 U.S. 629 (1968) (ruling that government may criminalize disseminating pornography that is obscene for minors, even though the material may not be obscene for adults. In *Ginsberg*, at 637-43, the U.S. Supreme Court specifically upheld a State Harmful to Minors statute, which provided protection for minors under 17 years of age from a more restricted type of pornography that is obscene for minors even though it may not be obscene for adults.

In *Ginsberg*, the Supreme Court definitively held that protecting children from exposure to obscene and sexually explicit harmful material satisfies a compelling governmental interest. This was reaffirmed by the Court in *Reno v. ACLU*, ___ U.S. ___, 117 S. Ct. 2329, 2347 (1997), which recognized the legitimacy and importance of the goal of protecting children from sexually explicit harmful materials, even though it struck the indecency provisions of the Communications Decency Act.

Regulation by the States of dissemination of sexually explicit material which falls within the category of harmful to minors, as Constitutionally delineated by the Supreme Court in the *Ginsberg* case, involves the *safety of children* -- a matter of surpassing public importance. The *Ginsberg* Court stated, at footnote 10:

> *fn10. . . .But despite the vigor of the ongoing controversy whether obscene material will perceptibly create a danger of antisocial conduct, or will probably induce its recipients to such conduct, a medical practitioner recently suggested that the possibility of harmful effects to youth cannot be dismissed as frivolous. Dr. Gaylin of the Columbia University Psychoanalytic Clinic, reporting on the prevailing view in psychiatry in 77 Yale L. J., at 592-93, said:
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> > It is in the period of growth [of youth] when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a workable sense of self, when sensuality is being defined and fears elaborated, when pleasure confronts security and impulse encounters control -- it is in this period, undramatically and with time, that legalized pornography may conceivably be damaging.

Footnote 10 of the *Ginsberg* case reiterates an important point made by Dr. Gaylin, which emphasizes that children are not as well prepared as adults to make an intelligent choice as to the material they choose to read:

> Psychiatrists . . . made a distinction between the reading of pornography, as unlikely to be per

> se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i. e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval -- another potent influence on the developing ego. *Id*. at 594.

The principle that society has a compelling interest in protecting minors from sexually explicit material has been consistently recognized by the United States Supreme Court. *See*, for example, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (concluding that the Government may compel broadcasters to refrain from airing indecent sexual material when children are likely to be in the audience or when nonconsenting adults may be viewers); *Ginsberg v. New York, supra*. In addition, the Supreme Court has uniformly ruled that governmental regulations may also act to facilitate parental control over children's access to sexually explicit material. *See Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992); and *Sable Communications v. FCC*, 492 U.S. 115 (1989)

Regulation of dissemination of sexually explicit material which falls within the category of Harmful to Minors, as Constitutionally delineated by the Court in the *Ginsberg* case, serves compelling state interests:

> (a) The State has power to adjust the definition of obscenity as applied to minors, for even where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (*see Ginsberg*, at 638-39.)
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> (b) Constitutional interpretation has consistently recognized that the parents' claim to authority in the rearing of their children is basic in our society, and the legislature could properly conclude that those primarily responsible for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility (*see Ginsberg*, at 639).
>
> (c) The State has an independent interest in protecting the welfare of children and safeguarding them from abuses (*see Ginsberg*, at 640-41).
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> (d) The Supreme Court has specifically held that a State regulation or law, in defining what is obscene for minors or harmful to minors on the basis of its appeal to minors under 17, has a rational relation to the objective of safeguarding such minors from harm (*see Ginsberg*, at 641-43).

Most states have enacted harmful to minors legislation, patterned after *Ginsberg v. New York*, 390 U.S. 629 (1968), *supra*.

IV. The legislative record should make clear whether it Is the intention of S. 97 to restrict only the dissemination of pornographic material which falls within the legal definition of "Harmful to Minors," as that term has been discussed and

delineated by the United States Supreme Court in Ginsberg, supra, and as further developed by subsequent case law or whether it is the drafters' intention to take a more expansive approach, discussed in Pico,[1] supra, and other Congressional and parental interests.

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[1] The *Pico* approach is more difficult to administer, but would be consistent with state existing laws which vest discretion to decide what is to be considered as appropriate material for acquisition or retention in a specific school or library decision-maker. *See Island Trees Board of Education v. Pico*, 457 U.S. 853 (1982). In that case, defendant School Board, rejecting recommendations of a committee of parents and school staff that it had appointed, ordered that certain books be removed from high school and junior high school libraries. *The Board gave no reasons for rejecting the recommendations of the Committee that it had appointed (which had recommended the retention of some materials)*. Plaintiff students brought an action under 42 U.S.C. 1983, alleging in essence that defendants had acted arbitrarily and in bad faith, ordering the removal of books from school libraries and proscribing their use in the curriculum, on the sole basis that particular passages in the books offended individual board member's personal social, political and moral tastes, *and not because the books, taken as a whole, were lacking in educational value*.

In *Pico*, a majority of Justices could agree only on the result. The U.S. Supreme Court held that the U.S. District Court's entry of summary judgment was erroneous where a material issue of fact remained as to the board's justifications (i.e. that there was a genuine issue as to a material fact, and that defendants were therefore not entitled to judgment as a matter of law, which made it inappropriate to dismiss the complaint on a motion for summary judgment). Because a majority of Justices could not agree on the underlying rationale supporting the result, the *Pico* Court issued no majority opinion. There were a total of seven opinions, in which five Justices voted to affirm the judgment (Brennan, Marshall, Stevens, Blackmun, and White), and four Justices dissented (Burger, Powell, Rehnquist, and O'Connor).

In spite of the splintered opinions, note the recognition, expressed by Justice Brennan in his plurality opinion (joined by Justices Marshall and Stevens, and joined in part by Blackmun), that *school officials are vested with discretion to make substantial, independent judgments* concerning the nature and character of material, and that they have the authority to execute a removal decision and can exclude from school libraries material which is *pervasively vulgar*, or *educationally unsuitable*, based upon their subjective good faith judgment [without waiting for a court of law to issue a judicial determination that the nature and character of the material is *in fact* pervasively vulgar or educationally unsuitable.] S*ee Pico*, 457 U.S. 853, at 863-864, wherein Brennan stated: The Court has long recognized that local school boards have broad discretion and management of school affairs. *See, e.g., Meyer v. Nebraska*, *supra* [262 U.S. 390 (1923)], at 402; *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). *See, also*, Brennan's opinion at 457 U.S., at 870-871: With respect to the present case, the message of these precedents is clear. Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner.... Thus, whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions . [R]espondents implicitly concede that an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. And again, respondents concede that, if it were demonstrated that the removal decision was based solely upon the educational suitability' of the books in question, then their removal would be perfectly permissible.'...In other words,...such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights.]

If the answer is that S.97 is directed at pornographic material delineated as being Harmful to Minors under *Ginsberg*, it is recommended that the language of S. 97 be amended to include specific reference to the legal term, as in federal and state laws such as the Child Online Protection Act of 1998 (47 U.S.C. 231) and state Harmful to Minors laws under the *Ginsberg* line of case law. If so, the Bill should also specifically require the restriction, to the extent possible in good faith, to hard-core and child depicting pornography that is obscene or child pornography under federal and state laws.

In the event that the Bill is directed at *Miller-Ferber-Ginsberg* material, the Bill's language should make it clear that the federal Government has made the decision not to fund the provision of access to any material available on the Internet which *could* be Constitutionally regulated or banned by the States, as part of the State's right (under the 10th Amendment Police Power) to protect its children, *whether or not* the specific State has a law regulating material harmful to minors or obscene or child pornography.

In the event the Bill is intended to enable school and library administrators to use filters which can or would restrict access by minors to other materials that are inappropriate for minors, then it should be clarified that what a filter should attempt to restrict includes, but is not limited to, pornography that is obscene, child pornographic, Harmful to Minors, as well as that which is otherwise harmful or inappropriate for minors, such as hate speech, excessive violence, bomb or poison making, educationally unsuitable, pervasively vulgar, *etc*.

In either event, this Bill serves an important and necessary governmental and parental purpose in protecting minor children from the openly available and freely obtainable amounts of pornography and socially damaging materials accessible on the Internet, World Wide Web, Usenet newsgroups, chat rooms, unsolicited emails, BBS, and other online interactive computer services. In this regard, this Bill addresses several pressing concerns for children:

1. S. 97 would have the effect of supporting what is an important state interest (*i.e*. the protection of minors), by refusing to allocate federal funds to provide minors access to materials which could be found to be inappropriate for minors or harmful to minors in an administrative decision by the state officials vested with the regulation and control of the affected school or library, as long as their decision complies with the Constitutional parameters set by the United States Supreme Court, and subsequent cases discussing this term of art.

2. S. 97 is not a federal regulatory statute. It imposes neither criminal nor civil penalties. It is not an effort by the federal government to regulate at the federal level what has been recognized as a legitimate area of state governmental concern: *i.e*. control over the dissemination to minors of materials that are harmful to minors. S. 97 does not impose an affirmative obligation on providers of Internet access to minors to desist in the dissemination to minors of harmful or inappropriate material, or impose a federal criminal or civil penalty on anyone for any failure to comply with the terms of the Act. Those who choose not to comply simply do not receive any federal subsidy for their activities. Under this Bill, schools and libraries are not restricted from

providing minors with free and unrestricted access to the Internet (although other federal or state laws may regulate this activity, such as federal and state obscenity, child pornography, and harmful to minors statutes). Under this Bill, minors are not restricted from receiving free and unrestricted access to the Internet using any other non-federally subsidized sources.

3. S. 97 is solely a federal spending bill. It attaches certain conditions to the receipt of federal monies. In the event that federal funds are wrongfully expended by any recipient, who is subsequently found to be disqualified under the specific terms of the Act, the only remedy is cessation of subsidized services or restitution of the value wrongfully received in violation of the Act.

4. Congress may, to some extent, constitutionally limit minors' access to material which would be protected if disseminated to an adult. *See, Reno v. A.C.L.U*, ___ U.S. ___, 117 S. Ct. 2329, 2347 (1997).

5. The States may, to some extent, constitutionally limit minors' access to material (harmful to minors) which would be protected if disseminated to an adult. *See Ginsberg, supra*

6. Congress may enact legislation that supports and protects the State's efforts to constitutionally limit minors' access to material (inappropriate for minors or harmful to minors) which would be protected if disseminated to an adult.

7. Congress may, to some extent, be selective on the basis of the content of protected speech in choosing what speech to fund, even where it could not do so by directly proscribing it. *National Endowment for the Arts v. Finley*, ___ U.S. ___, No. 97-371 (June 25, 1998).

V. S. 97 Leaves the Determination of What Constitutes Material Deemed "Harmful to Minors" Exclusively to the States to Decide and Seeks to Severely Limit Federal Review of State Decisions in this Regard.

Under S. 97, the decision to define and filter material harmful to minors is entrusted *only* to those persons or entities (*i.e.* any elementary or secondary school, school board, or other authority with responsibility for administration, or library) which historically have been vested with and regarded as possessing a legal right and duty to exercise discretion in the selection, acquisition, storage, and removal of materials (including any print medium) used in connection with the services provided by them to minors. S. 97 implicitly recognizes these already existing discretionary powers vested in the official decision-makers who shape the policy for any elementary or secondary school, or library, with respect to services to be provided to minors.

As an a act of federal partnership, S. 97 contains an additional federal grant of discretion to every elementary or secondary school or library affected by the Act, to be exercised in connection with matters recognized by Congress to have a substantial impact on U.S. Communication Policy. In enacting S. 97, Congress would be using its plenary power to protect and promote U.S. Communication Policy, by encouraging the good faith use of filtering or blocking technologies to

protect children. S. 97 authorizes that action be taken by a school or library regarding very difficult and complicated technical decisions involving the development and use of filtering software and other blocking and screening technological devices. This technology will remain in its infancy as long as a substantial number of persons and entities are afraid to use blocking or filtering devices in providing Internet access to children.

By directly authorizing the use of filtering and blocking technologies, S. 97 also removes some of the fear of being sued because of defects in design or implementation of any blocking and screening technological devices. Among other important considerations affecting interstate commerce and communication, S. 97 represents federal encouragement of the continued improvement and perfection of optimum blocking and filtering devices.

Federal removal of major disincentives, and federal encouragement and incentives for the development and utilization of blocking and filtering technologies, serves the ultimate goal of U.S. Communication policy and benefits *all* U.S. market segments, because it ultimately will result in the realization of better technological devices. S. 97 ultimately supports the empowerment of parents in their right to restrict children's access to objectionable or inappropriate online material, through the development, improvement, and perfection of filtering and blocking technologies to successfully accomplish this task.

S. 97 protects all elementary and secondary schools and libraries from becoming conduits providing access by children to material which is deemed inappropriate for them or harmful to minors by using filtering software. In that respect, it is important that S. 97 *is not a criminal statute*, and the determination of what is to be considered appropriate or harmful under S. 97 is left to the judgment of the particular school or library, who must exercise that discretionary judgment in light of the public mission of each respective school or library. The schools and libraries should be free to use filters, even if not perfect in accomplishing this delegated judgment, free from federal interference or judicial review. (To prevent a result such as that in the case of the federal court's enjoining the voluntary use of a filter by the Library Board of the Loudoun County, Virginia, Public Library in *Mainstream Loudoun (People for the American Way, the ACLU), et al. v. Board of Trustees of the Loudoun County Library*, Civ. No. 97-2049-A, ___ F. Supp. ___ (E.D. Va. Nov. 23, 1998) (granting preliminary injunction against Library's Policy on Internet Sexual Harassment).

S. 97, which permits the school or library administrator to rely on its own subjective good faith judgment in blocking or screening material considered by them to be harmful to minors, *does not impose civil or criminal liability on the "speaker" or "publisher" of the material it merely authorizes and protects any action taken in good faith by the school or library administrator to block or screen such material.*

This is consistent with existing discretion to decide what is appropriate material for acquisition or retention in a school library. *See, Board of Education v. Pico*, 457 U.S. 853 (1982). In that case, the *Pico* Court issued no majority opinion. There were a total of seven opinions, in which five Justices voted to affirm the judgment (Brennan, Marshall, Stevens, Blackmun, and White), and

four Justices dissented (Burger, Powell, Rehnquist, and O'Connor).

In spite of the splintered opinions, note the recognition, expressed by Justice Brennan in his plurality opinion (joined by Justices Marshall and Stevens, and joined in part by Blackmun), that *school officials are vested with discretion to make substantial, independent judgments* concerning the nature and character of material, and that they could remove and exclude from school libraries material which is *pervasively vulgar*, or lacks *educational suitability*, based upon their subjective good faith judgment, without requiring any court of law to issue a prior judicial determination that the nature and character of the material is *in fact* vulgar or educationally unsuitable. S*ee Pico*, 457 U.S. at 863-864, wherein Brennan, J., stated: The Court has long recognized that local school boards have broad discretion and management of school affairs. *See, e.g., Meyer v. Nebraska*, *supra* [262 U.S. 390 (1923)], at 402; *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). *See, also*, Justice Brennan's opinion on the criteria that would be constitutionally permissible, 457 U.S. at 870-871:

> With respect to the present case, the message of these precedents is clear. Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner.... Thus, whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions . [R]espondents implicitly concede that an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were **pervasively vulgar**. And again, respondents concede that, if it were demonstrated that the removal decision was based solely upon the **educational suitability'** of the books in question, then their removal would be perfectly permissible.'...In other words,...such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights. [Emphasis added.]

VI. It is Important to Grant Immunity for the Creation, Implementation, and Enforcement of a Filtering or Blocking Policy under this Act.

S. 97 appears to treat both the definition and the determination of what constitutes material harmful to minors as matters which are intended by Congress to remain exclusively within the province of determination by state school and library officials, who are vested with regulatory decision making authority under applicable state law and empowered to make these decisions by this federal Act. *See* Bill Sections (5)(A), (5)(B), (5)(C), and (5)(G)(i) and (5)(G)(ii), which identify as responsible decision makers, authorities with responsibility for administration.

The Bill does not seek to create a federal definition of proscribed matter, but is directed at supporting decisions under state law, which come within permissible federal Constitutional parameters for school and library administrators. The choice of technology is to be implemented as a state administrative decision, through an interpretation by state officials, who have been vested

under state law with regulatory decision making power over the respective schools or libraries affected by this funding program, as part of the normal course of their official duties. *See* Section G of the Bill, entitled Determinations of Material Deemed to be Harmful to Minors, which states that the determination of what material is to be deemed harmful to minors shall be made by the school, school board, or other authority, or library, that is responsible for making the certification under the Act.

This Bill could also include some express provision for immunity for technology use, engrafted onto S. 97, which is patterned after and expands on the existing CDA provisions of 47 U.S.C. 230, recognizing the importance of developing blocking and filtering technology, the disincentives that exist regarding the use of such technology (*i.e.* fear of being sued for the wrong filter choice under 42 U.S.C. 1983), and having to pay requested attorneys fees under 42 U.S.C. 1988. The language should be express that the immunity provided in S. 97 is immunity from suit under federal or state law, including suits for damages, injunctions, or declaratory judgments, and should be drafted to overcome the interpretation problem over what immunity means, addressed by the November, 1998, decision of the federal district court in the *Loudoun* case, in the context of considering the immunity provisions of 47 U.S.C. 230, wherein the district court stated:

> Defendant [Board] has requested that we reconsider our previous [April, 1998] finding that it is not immune from this litigation pursuant to a provision of the 1996 Communications Decency Act granting absolute immunity to good faith users of filtering software. *See* 47 U.S.C. 230(c)(2)(A). In our previous opinion, we found that 230 provides immunity from actions for damages; it does not, however, immunize defendant from an action for declaratory and injunctive relief. We see no reason to stray from our earlier decision, which is the law of this case**. If Congress had intended the statute to insulate Internet providers from both liability and declaratory and injunctive relief, it would have said so.** [Emphasis added.]

Regarding policy reasons for granting expansive immunity, *see Bogan v. Scott-Harris*, ___ U.S. ___, No. 96-1569, 1998 WL 85313 (Mar. 3, 1998). The initial decision in April, 1998, of the federal district court in the *Loudoun* case discussed the *Bogan* decision:

> It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities. *Bogan v. Scott-Harris*, No. 96-1569, 1998 WL 85313, at *2 (Mar. 3, 1998); see *Lake Country Estates v. Tahoe Regional Planning Auth*., 440 U.S. 391, 404 (1979). Legislative immunity bars not only actions for damages but also 1983 actions for declaratory and injunctive relief. *See U. of Va. v. Consumers Union*, 446 U.S. 719, 732 (1980). Such immunity applies both to the legislative body itself and to its individual members. *See id*. at 733-34. Legislative immunity is premised on the notion that private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation. *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 503 (1975). The Supreme Court has also recognized that the threat of civil liability robs legislators of the courage necessary to legislate for the public good. *See Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *see also Lake Country*, 391 U.S. at 405.

> This term, in *Bogan*, the Supreme Court explicitly extended absolute immunity to local government officials, finding that such officials are likewise absolutely immune from suit under 1983 for their legislative activities. *See Bogan*, 1998 WL 85313, at *4; *see also Bruce v. Riddle*, 631 F.3d 272 (4th Cir. 1980) (finding legislative immunity for local legislators). The Court held that city council members acted in a legislative capacity when they voted to adopt an ordinance eliminating the respondent's department, and were therefore entitled to absolute immunity. *See id*.

In *Loudoun*, the district court found that although the Library's Board was entitled to legislative immunity for adopting the filter policy with respect to providing Internet access to the community, the same Library Board (under its management responsibility) was subject to being sued for the enforcement of the filter policy.

The ultimate effect of S. 97 is to further U.S. Communication Policy by encouraging the development of U.S. technologies which ultimately will maximize user control over what information is received by those who use the Internet and other interactive computer services. By specifically authorizing schools and libraries to use technologies that filter or block Internet access to minors of material deemed to be harmful to minors, S. 97 intends to remove one of the fear elements which might otherwise prevent a substantial segment of the market (*i.e*. any elementary or secondary school, or any library) from ever attempting to use filtering software and other screening or blocking technologies, because of the threat of lawsuits being filed in connection with the mere choice of such usage. *See, for example,* the *Loudoun* case, a suit under 42 U.S.C. 1983 against a library for voluntarily using a filter, which includes a demand by People for the American Way and the ACLU for a half million dollars in attorneys fees under 1988. Although the amount is not publicly disclosed, it is believed that the attorneys for the plaintiffs in *ALCU, et al. v. Reno*, and *American Library Association, et al. v. Reno*, submitted demands for well over a million dollars in fees following the litigation over the Communications Decency Act. Such awards of attorneys fees for obtaining an injunction under 1983 are a major deterrent to voluntary use of filter software, in spite of the immunity from damages provided in the CDA, 47 U.S.C. 230, so Congress is right to seek to protect the schools and libraries from suits and court supervision for using filters under this Bill. This can and should include express immunity from suits for injunction and judicial review under 42 U.S.C. 1983, from attorneys fees under 1988, and from damage liability, as in 47 U.S.C. 230.

The granting of absolute immunity from suit, for school and library administrators for actions taken in good faith to implement this Act's filter-blocking technology policy, would probably be an essential aspect to the success of this Bill. S. 97 could be amended to include such immunity, because in light of the outcome of the *Loudoun* case, school and library administrators would be justifiably afraid of being sued in federal court for enforcing any policy which implements the use of filter or blocking technology in connection with providing Internet access to minors.

VII. The Importance Of Preserving Exclusive State Court Adjudication Of All

Matters Connected To The Determination Of What Constitutes Material "Harmful To Minors" or "Inappropriate for Minors", With Ultimate Review By The U.S. Supreme Court, And Of Clearly Removing Subject Matter Jurisdiction From The Lower Federal Courts Over The Same Issues.

As discussed above, S. 97, in its present form, does not define the meaning of the term harmful to minors. In addition, Section (5)(G)(ii) contains a prohibition on federal interference, which states that no agency or instrumentality of the United States Government may:

(1) establish criteria for determining what constitutes harmful to minors,

(2) review a determination made by the designated school or library decision makers as to what constitutes material harmful to minors, or

(3) consider the criteria employed by the school or library decision makers in the administration of subsection (h)(1)(B).

This approach (excluding federal review of the criteria and determination of what constitutes harmful or inappropriate material)[2], appears to be an attempt to clarify that:

1. this legislation is intended to support state efforts to protect its children from material deemed to be inappropriate for minors or harmful to minors under state law, and that Congress recognizes and intends that the subject matter jurisdiction over this determination is a state matter, and is to remain vested exclusively in the individual States.

2. all legal disputes should remain as matters to be adjudicated and interpreted by the state administrative officers and reviewed only under state rules and judicial procedures.

S. 97 takes an aggressive approach towards excluding federal review of the state school or library's decision with respect to what constitutes material harmful to minors. The problem is that while Congress can by statute prevent lower federal courts from being able to review this state administrative determination (by removing their jurisdiction over the subject matter), the language employed by S. 97 may not accomplish this result. It could also be clarified that ultimate review by the United States Supreme Court of any state court case involving the state administrative determination is not precluded.

Therefore, S. 97 could provide:

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[2] *See* Section G(ii) (I) and (II): (ii) Prohibition on Federal Action. No agency or instrumentality of the United States government may

(I) establish any criteria for making a determination under clause (i);

(II) review a determination made by a school, school board, or other authority, or library, for purposes of a certification under subparagraph (C); or

(III) consider the criteria employed by a school, school board, or other authority, or library, in the administration of subsection (h)(1)(B).

1. that subject matter jurisdiction with respect to the adjudication of all legal disputes regarding the propriety of the determination by State officials as to what constitutes material harmful to minors or inappropriate for minors shall remain vested exclusively within the State Judicial System (under the Ninth, Tenth, and Eleventh Amendments), with ultimate review by the United States Supreme Court of completed State Court Judgments on all issues involved, and

2. that the United States district courts and courts of appeals are specifically denied subject matter jurisdiction to review these state administrative decisions.

VIII. Conclusion

The National Law Center for Children and Families is of the opinion that S. 97 provides a much needed federal incentive to the use of available and developing filtering technologies to protect minor children from pornography and other harmful and dangerous materials available on the Internet and other interactive computer services. The offer of discounted online access by subsidy of the taxpayers through the United States Government should empower schools and libraries to provide computers with filtered protections for use by minors, thus granting access to the benefits of this important communications medium as an educational and social tool that will be as indispensable to the next generation's development as school and library books have been to those of past generations. The promise of the Internet is that children should be able to use computers freely and extensively. Granting minors access to the Internet need not, however, involve granting pornographers and pedophiles access to our children and grandchildren. This can and should be done and S. 97 is an important step in having Congress bring this promise to bear without unfairly exposing our minor children to harmful or unlawful materials or denying minors the use of this medium in order to protect them from the dangers included within it. This Bill would be an effective, constitutionally valid measure to further the Government's surpassing importance of protecting children and assisting parents in both the protection and the education of all our children.

Respectfully submitted, March 4, 1999:

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